**IN THE HIGH COURT OF NEW ZEALAND**
**ROTORUA REGISTRY**

**CIV-2012-463-000002**
**[2013] NZHC 1071**

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| UNDER | the Family Protection Act 1955 |
| IN THE MATTER OF | an appeal from the Family Court at Waitakere |
| BETWEEN | YVONNE PAULA CARTER<br>Appellant |
| AND | BRENT CAMPBELL CARTER, SCOTT JONATHAN CARTER, NIKKI ANGELA ROGERS AND DANIEL WARD CARTER<br>First Respondents |
| AND | PUBLIC TRUST TAUPO<br>Second Respondent |

Hearing: 21 September 2012

Counsel: J H Olphert and A G Carbon for Appellant
R C Gregory and G Muller for Respondents

Judgment: 13 May 2013

*In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 4:30pm on the 13th May 2013.*

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**JUDGMENT OF WILLIAMS J**

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Solicitors:
Olphert & Associates Ltd, Solicitors, Rotorua
Smith & Partners, Solicitors, Waitakere City

## Introduction

[1] This case concerns the will of John Carter, who died on 20 August 2008. In his will, John provided that his adult children from his first marriage to Marjorie Carter (Brent, Ward and Scott Carter and Nikki Rogers, the first respondents) were to receive the residue of his estate. This turned out to be about 10.5 per cent of its total value. John left the remainder to his wife at the time he died (Yvonne Carter, the appellant).

[2] His children were not happy. In March 2009, they applied to the Family Court under s 4 of the Family Protection Act 1955 (the Act) for further provision from the estate. Yvonne opposed the application.

[3] On 10 November 2011, the court gave judgment in favour of the children.[1] The learned Judge found that the deceased owed his children a moral duty to provide them with more than he had decided to leave them. Her Honour decided that a more reasonable share of the state would be $50,000 per child (a total of about 40 per cent of the estate in value).

[4] Yvonne now appeals against that decision. Her concerns, it seems, are not with the learned Judge's statements of the law, or the background facts. Rather, they are with how the Judge applied that law to the facts. Specifically, she alleges:

(a) the Judge was wrong to find John's moral duty to his children extended to making further provision for them than he had made in his will; and

(b) in the alternative, if John did breach his moral duty, the Judge's calculation of a reasonable share of the estate to reflect that larger duty was excessive.

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1 *BCC v Public Trust Taupö* FC Taupo, FAM-2009-069-000091, 10 November 2001.

[5] The children oppose the appeal. The Public Trust (the second respondent) has signalled it will abide the decision of the court.

**The facts**

[6] The facts are fully set out in the Family Court judgment and I draw heavily from it in the following brief summary.

[7] John married Marjorie Carter and raised four children: Nikki, Scott, Ward and Brent. The family lived at a farm at Ongarue Stream Road, Waimiha – a farm into which John was in turn assisted by his parents. As was usual then and now, all of the family pitched in with the farm work. The children's respective relationships with Marjorie were, as it was agreed, very difficult. The detail need not be gone into because it is not relevant here, but its effect was to drive the children closer to their father. When John and Marjorie split up in the early 1980s, the farm was sold and John purchased mortgage-free, a property at 58 Wakeman Road, Taupö, with his share of the proceeds.

[8] The boys Scott, Ward and Brent lived with their father. Nikki (the girl) was, by that stage old enough to have left home. John formed another relationship with another woman during this period but it did not last.

[9] In 2000, John met Yvonne and they married in 2002. She was much younger. At the time of John's sudden death in 2008, he was 71 years old and she 51. Thus the relationship was of some eight years duration (including six years of marriage). There are no children of the marriage. There is no question that this marriage was a happy and loving one for the couple. Yvonne described John as her soul mate and, from the material I have read, that view appears to have been neutrally held.

[10] The relationship between John and his children during the years of his marriage to Yvonne remained firm and unbroken. Contact diminished somewhat, but that appears to have been simply a reflection of the fact of the new relationship and that the children had married and now lived elsewhere.

[11] Nikki was 48 at the time of first hearing. She is married and lives in the UK. She has no dependent children. There was some evidence of a strain in her relationship with her father due to a dispute relating to a house swap arranged between Nikki and one of Yvonne's children. This, in the learned Judge's view, did not displace the general proposition that family bonds remained strong. Scott was 47 at the time of the hearing. He is married with two dependent children and lives in Auckland. Ward and his partner live in Nelson. He has one dependent child. Brent was 41 at the time of hearing. The judgment does not record where he and his family live but notes that he is employed in a senior management position.

[12] It was common ground that none of the children is in economic need.

[13] John made two previous wills with the Public Trust, one in May 1993 and then another in October 2002, coinciding with his remarriage. The first will divided the residue estate equally amongst his children. The second will left his home, furnishings and effects, and a motor vehicle to Yvonne. This rearrangement of his estate on death was carefully thought through.

[14] Mrs Rosemary Ritchie who provided an affidavit on behalf of the Public Trust annexed to it a form entitled "Questionnaire for the Will for CARTER JOHN M". In the form (obviously filled out during an interview between the two), John acknowledges that he has in the new will, made minimal provision for his children. He said:

> The Family Protection Act has been explained to me. My primary concern is to provide for my wife Yvonne as my children are all adult and self supporting.

[15] Thus, it was common ground that John had considered the position of his children and actively preferred to distribute the bulk of his estate to his wife. The driver was that all of his children were independent and none were in any particular financial need.

[16] The assets of the estate are relatively straightforward. The primary asset is the mortgage-free home in Taupö. It is independently valued at $494,000. Chattels and personal property have not been valued nor have shares belonging to the estate.

A joint bank account held cash of the order of $166,000. This account transferred to Yvonne by survivorship and does not form part of the estate.

[17] It appears uncontroversial that the net value of the estate is around $553,000. On that basis, the learned Judge concluded that, under the will, the children receive about 10.5 per cent of the net estate (2.6 per cent each) while Yvonne received about 89.5 per cent.

**The Family Court decision**

[18] The court found that, overall, when preparing his last will, John did not deliberately *choose* to breach his obligations to his children (of which obligations he was well aware), but rather unconsciously overestimated his obligations to his wife, and underestimated those to his children.[2]

[19] The Judge found John overestimated his obligations to Yvonne, for the following reasons:[3]

> Whilst the deceased had a moral duty to Yvonne Carter, I am satisfied that the deceased overestimated the strength of his moral duty to his wife, having regard to the following factors:
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> - Whilst I accept that it was a loving and important relationship to both the deceased and Yvonne Carter, it was not a particularly long marriage due to the deceased's untimely death. That in no way minimises the enjoyment and comfort derived by both mutually from their marriage.
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> - That there were no dependent children of their marriage, which would in my view have strengthened the deceased's moral duty to Yvonne.
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> - The fact that aside from the Estate, Yvonne Carter took by survivorship the bank account proceeds of $166,000. There is no evidence as to the extent to which she had contributed cash resources to that bank account. The inference from the documents annexed to Mrs Ritchie's Will is that those cash resources were accumulated by Mr Carter.
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> - Yvonne Carter had financial resources of her own, according to the evidence, and that factor, along with the substantial cash sum, puts Yvonne Carter in a comfortable financial position.

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2 *C v C* FC Taupo, FAM-2009-069-000091, 10 November 2011 at [65].

3 At [64].

[20] The Judge then found John underestimated his moral duty to his children. In particular, his reduced contact with them in recent years, and his recently strained relationship with Nikki, did not disentitle them to a greater share of the estate. This was for the following reasons:[4]

> In terms of assessing whether the deceased had breached his moral duty, I find that the following factors are relevant:
>
> (a) That the relationship between the claimants and the deceased was an important relationship. It was a close and loving relationship, and whilst the contact with their father may have diminished after his marriage to Yvonne Carter, I do not find that to be unusual. In short, the deceased's children were "dutiful".
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> (b) I accept Mr Smith's submission that it was a functional family. It is not a situation where there is any disentitling conduct. I place emphasis also on the evidence that the children, in their own different ways, gravitated towards their father because of their, at times, difficult relationship with their mother as they were growing up. The difficulties with their mother meant that the children's relationship (particularly the three boys) with their father assumed significance for them.
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> (c) Whilst Nikki and her father were estranged for a period of three years, I consider that a broader view needs to be taken of the relationship. Estrangement does not of itself necessarily negate moral duty, having regard to *Silbery v Silvery-Dee* (HC Wellington, CIV-2005-485-2499, 22 August 2007, Simon France J).
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> (d) That underpinning the deceased's decision in terms of his Will was a desire and motivation (understandable) to provide for Yvonne Carter, balanced against a perception that his children were adults and self-supporting.
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> (e) That the deceased did have a close and loving relationship with Yvonne Carter which brought him happiness in his twilight years. I have no hesitation in accepting that it was an important relationship but I am entitled, in my view, to place some weight on the fact that it was not of a particularly long duration. That does not in any way diminish the significance of the relationship to the deceased.
>
> (f) The origin of the Estate is an important factor. The assets appear to have been accumulated by the deceased prior to meeting Yvonne Carter, both through his work ethic and his family of origin.
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> (g) There is no evidence that Yvonne Carter has contributed to the assets which form the basis of the Estate, unlike the situation in *Horne v Public Trust* (HC Nelson, CIV-2010-442-000044, 4 May 2010, Ronald Young J).

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4 At [80].

(h) That Mrs Carter's perception that the deceased had financially provided for the children during his lifetime is erroneous. The evidence is that the deceased held inherited funds from other family members on trust for his children, rather than providing them with any direct financial benefit himself.

(i) I accept that the Estate is moderate and that a moral duty is owned to both Mrs Carter and to the claimants. Thus, it is a matter of balancing those two competing interests. There is no evidence, however, to suggest that Mrs Carter has any particular financial need. In making that observation, I do not suggest that she bears any onus to justify the bequests made to her by the deceased.

(j) The deceased had enjoyed a close and loving relationship with his children, which naturally diminished in frequency of contact as the children and the deceased indeed led their own lives. This is not a situation where the deceased and the claimants have had long term strained or limited relationships. The deceased's understandable desire to provide for Yvonne Carter, having regard to their close and happy relationship, meant that he underestimated the moral duty he had to his adult children.

[21] John had therefore breached his moral duty and the first respondents were entitled to claim under s 4 of the FPA. The next question was the quantum of the substitute award.

[22] On this point, her Honour acknowledged that any award could only go as far as necessary to remedy the breach of duty. The Judge reviewed a series of Court of Appeal decisions showing a wide range of awards have been made (a point not contested on appeal). She acknowledged Mr Olphert's submissions that she should adopt a conservative approach and not essentially "re-write" John's will.[5]

[23] Her Honour decided that an award of $50,000 per child (including their share of the residue) was reasonable, for the following reasons:[6]

(a) I adopt the reasoning set out in paragraphs [81](a)-(j) in respect of the factors taken into account in terms of assessing whether there has been a breach of moral duty;

(b) I recognise that there are competing moral duties owed by the deceased and that his moral duty to Yvonne Carter is an important duty;

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5 At [91].
6 At [93].

(c) Mrs Carter, however, appears to be in a comfortable position financially, unlike the widow in *Woodcock v Beatson*; in that regard, I note the fact that Mrs Carter has also had the benefit of the bank account proceeds of $166,000 which otherwise would have been included in the Estate;

(d) that whilst it was a conscious and deliberate decision on the part of the deceased to provide for Yvonne Carter, that should not be at the expense of his moral duty to his children;

(e) the origin of the Estate is an important factor and I place emphasis on the fact that the Estate was accumulated through inheritances and the deceased's efforts and that it was not accumulated jointly during the marriage between he and Mrs Carter. If that had been the case, the outcome may have been different;

(f) such a sum recognises the family relationships and mutual love and support as between the deceased and his adult children, but also reflects the need to remedy the breach to the least extent necessary. The sum recognises the claimants' support for their father over the years and that they were dutiful;

(g) such a sum recognises that Mrs Carter, should she have made a relationship property claim, would have been entitled to a 50 per cent share of the assets;

(h) whilst the claimants' financial positions are comfortable, additional provision will enable them to have a financial buffer/contingency fund to assist with their future;

(i) the current net value of the Estate has been used for the purpose of considering quantum.

[24] Judge MacKenzie also awarded the children certain family heirlooms as to which I will make further comment below.

## Submissions

*Appellant*

[25] Mr Olphert submitted that, on jurisdiction, the principles for determining the scope of this court's powers are correctly stated in *Blackstone v Blackstone*.[7] In that case, the Court of Appeal held that, for questions of fact and degree entailing value

[7] *Blackstone v Blackstone* [2008] NZCA 312.

judgements, the *Austin, Nicholls*[8] standard applies, while for appeals against exercises of discretion, the *May v May*[9] standard governs.

[26] In the light of this guidance, he submitted that Judge Mackenzie's decision to recognise a moral duty here was a question of fact and degree (and should be dealt with on *Austin, Nicholls* principles), while the decision on quantum could conceivably be either a question of fact or an exercise of discretion (this point was left open).

[27] Mr Olphert identified the substantive issues before this court as being:

(a) whether Judge Mackenzie was wrong to hold the deceased owed the first respondents a moral duty, entitling them to a greater share of his estate than had in fact been provided, to reflect an "adequate provision" for their "proper maintenance and support" pursuant to s 4 of the Act; and

(b) if the answer to that question is no, whether Judge Mackenzie was nonetheless plainly wrong in awarding the quantum of support she did.

[28] On the first issue, he submitted that the law on the scope of moral claims to entitlement under s 4 is settled, referring to *Little v Angus,*[10] *Williams v Aucutt,*[11] *Auckland City Mission v Brown*[12] and *Vincent v Lewis*.[13] On the facts, he submitted that they do not support a claim for an extended moral duty beyond the scope of the provision in the will, because:

(a) John was well aware of the relevant provisions of the Act and his (moral) obligation to make adequate provision for his children. He was intelligent and thorough, and considered his legal and moral

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8 *Austin, Nicholls & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
9 *May v May* (1982) 1 NZFLR 165 (CA).
10 *Little v Angus* [1981] 1 NZLR 126 (CA) at 127.
11 *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [68]–[70] per Blanchard J.
12 *Auckland City Mission v Brown* [2002] 2 NZLR 650 (CA) at [33].
13 *Vincent v Lewis* (2006) 25 NZFLR 812 (HC).

obligations carefully (see affidavit of Mrs Ritchie). He generally acted as a wise and just testator would have done;

(b) John did gift his children the residue of his estate (being 10.5 per cent of its value). This is a significant amount;

(c) disparity in treatment between beneficiaries or a perception that the will might be unfair is not enough;

(d) the adult children lead modest to comfortable lifestyles and are not in financial need;

(e) there are competing moral claims (between what John felt and how his children feel). John had enjoyed "happy, loving and fulfilling relationship" with the appellant and saw her interests as paramount. Conversely, John had considerably reduced "physical and emotional contact" with his children over the last seven years of his life. Still, he remained mindful of his obligations to them, as shown by his provision for them;

(f) more generally, where there are competing moral claims, a conservative approach should be taken: "preference must be given to the testator's wishes, regardless of whether this is considered fair or not";

(g) here, he submitted, some provision was made. John genuinely believed it was adequate. It is not enough that his children simply received less than they expected.

[29] On the second issue, Mr Olphert submitted that the extra award made was excessive, because:

(a) Judge MacKenzie correctly acknowledged she was required to proceed conservatively and should not effectively re-write John's will;

(b) Judge MacKenzie was also correct to observe that the range of awards in cases involving family recognition and support have been wide;

(c) however, the Judge was wrong to place so much emphasis on the fact the appellant received $166,000 from joint bank accounts held with John (calling it a "highly germane factor"). The amount awarded to a beneficiary should not, of itself, permit the court to override the testator's clear intentions. On this point, counsel relies on *Williams v Aucutt*[14], in which Blanchard J observed that a beneficiary under a will does not have to justify the share of the estate they receive;

(d) John's provision of 10.5 per cent of the estate was enough to make adequate provision for his children. This is especially so when certain family heirlooms (initially left to the appellant but which she is happy to negotiate releasing) are factored into the equation. The parties agree that passing on property is very important to the Carter family. The items concerned have great sentimental value. They are accordingly included within the "support" provided;

(e) Judge MacKenzie's uplift award (from 10 to 40 per cent of the Estate) was too large and contrary to principle. The Judge was not applying the conservative approach. A revised award of that size was not necessary to remedy any breach;

(f) the large award was also clearly contrary to the testator's wishes. John plainly wanted his partner to inherit the bulk of his estate. As a consequence of the award, the appellant would only inherit about 60 per cent of it;

(g) a more reasonable award would have been 20 per cent of the estate. This would meet the needs of his children, while not overriding his clear testamentary intentions.

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[14] *Williams v Aucutt* [2000] 2 NZLR 479 (CA).

*The children*

[30] Ms Gregory for the first respondents submitted, on jurisdiction, that she accepts the first issue on appeal (the extent of the moral duty owed) is a question of fact and degree and therefore is governed by *Austin, Nicholls*. She contended, however, that consistent with the judgment of Woodhouse J in *Moon v Carlin*,[15] the issue of the amount of relief is an appeal against an exercise of discretion, and the *May v May* standard applies.

[31] Elaborating on the *Austin, Nicholls* standard, Ms Gregory directed me to *Kacem v Bashir*[16] and *JEW v TAB*].[17] In the former case, the Supreme Court cautioned that, when reconsidering the merits of a decision, the court is not required to be "uninfluenced" by the earlier decision, and may take it into account (although the weight it affords that reasoning is a matter for it). In the latter case, Whata J found (rightly in my respectful view) that *Austin, Nicholls* still requires there be a "plain ground" for departing from the earlier decision.

[32] Ms Gregory accepted the applicable law is as stated in the appellant's submissions.

[33] On the first issue, Ms Gregory submitted Judge MacKenzie was correct to hold that John's provision for his children was inadequate and that relief was warranted under s 4. In support, she submitted:

(a) to grant relief under s 4 (that is, to satisfy itself of the "wise and just testator" test) the court does not need to find there was any deficiency in the deceased's character. It is sufficient that there is an error of judgement or "underestimation" by the deceased of the scope of his or her moral duty to those close to him/her;

(b) the correct approach is to balance all factors and weigh all moral imperatives. Judge MacKenzie did this;

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15 *Moon v Carlin* HC Auckland CIV-2010-404-5486, 23 February 2011.
16 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.
17 *JEW v TAB* HC Auckland CIV-2011-404-613, 23 November 2011.

(c) in terms of John's relationship with his children:

(i) it was "important, close, loving and dutiful" despite the events of recent years. There had been mutual love and support for many years;

(ii) the relationship had further special significance due to the children's "difficult" relationship with their mother;

(iii) the decrease in contact over the last several years must be viewed in context; a long-term view of the relationship must be taken;

(iv) John had not provided for his children financially during his lifetime;

(v) there was no disentitling conduct by the children;

(d) in terms of John's relationship with the appellant:

(i) it was close and loving, but was "not of particularly long duration";

(ii) there is no evidence the appellant had any financial need. She lives comfortably and received the benefit of her joint bank account with John.

(e) here, John was intelligent and just, but simply underestimated his duty to his children.

[34] On the second issue, Ms Gregory submitted simply that none of the *May v May* grounds are made out. Judge MacKenzie applied the correct law. She understood she was limited in her award to the minimum necessary to remedy the breach. She took into account all relevant matters. She was not "plainly wrong" in her outcome.

**Jurisdiction on appeal**

[35] I deal first with the points raised about the appropriate standard on appeal. The first respondents have conceded that *Austin, Nicholls* applies to the breach of moral duty issue. The remaining question is whether determining the quantum of an award under s 4 Family Protection Act 1955 is truly a question of discretion (so as for the standard in *May v May* to apply).

[36] As the Supreme Court acknowledged in *Kacem v Bashir*, distinguishing questions of discretion from those of fact and degree can sometimes be difficult.[18] The Supreme Court did acknowledge, however, that clear statutory language, while not determinative, can be strongly illustrative. Here, s 4 states clearly:

> [if inadequate provision is made in a will for a person who has standing under the Act] the court may, *at its discretion* on application so made, order that *any provision the court thinks fit* be made out of the deceased's estate for all or any of those persons. (emphasis added).

[37] The words "at its discretion" and "any provision the court thinks fit" strongly imply a discretion. Now, I accept that "at its discretion" seems to apply to the decision to recognise a claim at all (a decision which the first respondents have accepted is governed by *Austin, Nicholls*) – but these words still form part of the context in which the question of quantum is to be decided. This outcome is also consistent with this court's decision in *Moon v Carlin* (supra).

[38] I would recognise that question is one of discretion attracting the *May v May* standard.

***Issue 1: Did a wider moral duty exist?***

[39] There was no dispute as to the relevant law here. As such, I do not go into detail except where absolutely necessary.

[40] Taking the main points from the cases cited by counsel:

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[18] *Kacem v Bashir*, above n 16, at [32].

(a) the question is whether the testator made "adequate" provision in his will for the claimants' "proper maintenance and support";

(b) this will not be established where the testator can be said to have breached a "moral duty" to the claimants, as judged by the standards of a "wise and just testator";[19]

(c) this is "customarily" tested as at the date of the testator's death (although recent events may be considered when determining quantum);[20]

(d) the question is broad. "Support" includes providing recognition for the emotional relationship between the claimant(s) and deceased, as well as provision for financial or economic need.[21] Relevant factors in assessing need include the size of the estate, any competing moral claims to the estate and changing social attitudes (regarding what would constitute fair provision).[22] Moral and ethical factors are relevant;

(e) to interfere the court must identify a demonstrable and unmet need for support (as broadly defined above). A disparity in treatment between beneficiaries is not enough. A perception the will is unfair is not enough. The testator is entitled – to an extent – to treat beneficiaries differently. The claimants' genuine unmet need must be clearly identified.

[41] To this list, I would add that the overall inquiry is obviously intensely fact and context-specific.

[42] In my view the Judge did address the matters raised by Mr Olphert on appeal. For example, the Judge acknowledged:

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19 *Little v Angus* [1981] 1 NZLR 126 (CA) at 127.
20 At 127.
21 *Williams v Aucutt*, above n 14, at [52].
22 *Little v Angus*, above n 19, at 127.

(a) that John was plainly aware of his legal obligations to provide for his children, and that his will reflects his own choice about what was adequate;[23]

(b) that mere disparity in treatment or perception the will is unfair is not enough;[24]

(c) that there were competing moral claims to the estate;[25]

(d) the degree of estrangement between John and his children;[26]

(e) that the children are not in financial need;[27]

(f) that a beneficiary does not have to justify her gift in a will.[28]

[43] Mr Olphert's complaint really was that the learned Judge failed to take a sufficiently conservative approach in deciding whether to interfere in the distribution under the will. He argued that the learned Judge was insufficiently deferential to the clear choice of the testator in this case and therefore strayed into the role of trying to create a fair distribution when the authorities are clear that this is not permissible.

[44] I do not agree. Section 4 was enacted to allow clearly expressed wishes of testators to be set aside where that person's moral duty to another (or others) has been breached. I agree with the learned Judge that John owed a moral duty to the children of his first marriage and that the extent of that duty exceeded the limited allocation he made in the will. I agree with the learned Judge that his short but intense and fulfilling relationship with Yvonne blinded him to that duty. It is not a question of fairness at all, and the learned Judge did not make her decision on that

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23 *BCC v Public Trust* Taupö, above n 1, at [42] ("The affidavit of Mrs Ritchie dispels any notion that Mr Carter was not aware of or was mistaken about his moral duty in terms of his Estate") and [58] ("It is clear that he was advised as to his moral obligations, and self-determined where he perceived his moral obligations to be").

24 At [14], [20](b), [27].

25 Inherent. It pervades the judgment. It was plainly the focus of the Judge's most careful attention. But see in particular [22], [58], [59]-[65], [80](i).

26 At [73]-[76].

27 At [54], [55], [56] and [57].

28 At [20](a).

basis. It is rather about trying, as objectively as possible, to calibrate the gravity of a moral obligation owed by a father to adult children of an earlier marriage. Crucial elements in my view were:

(a) the dominant influence and support in John's life for the eight years prior to his death was Yvonne;

(b) yet his connection to and relationship with his children was also sound; and

(c) in the unique circumstances of this particular family, the relationship between a father and his children had, during the children's vulnerable years, been of transcendent importance to them.

[45] When these factors are brought together, some favouring Yvonne, some favouring the children, I have no difficulty in agreeing with the learned Judge that John had, in hindsight, unconsciously undervalued his relationship with his children and breached his moral duty to them thereby. In particular, he had, perhaps understandably, let the glow of finding true love late in life and probably for the first time, eclipse element (c).

***Issue 2: Was the amount of the award excessive?***

[46] This appeal ground is governed by the somewhat stricter *May v May* test. Judge MacKenzie's award can only be disturbed if the Judge erred in law, failed to consider a relevant factor, considered an irrelevant factor, or was plainly wrong.

[47] Mr Olphert accepts that the Judge did not err in law. The Judge acknowledged the need for a conservative approach to determining quantum, and that any uplift should be no more than the minimum necessary to remedy the breach. Nor is there any suggestion that she failed to consider any additional relevant factors. Mr Olphert's objections boil down to:

(a) the Judge considered an irrelevant factor, namely Yvonne's receipt of the $166,000 in joint bank accounts; and

(b) the Judge's decision was 'plainly wrong' in the *May v May* sense. The amount of the reallocation to the children was plainly excessive. A more reasonable assessment would have been 20 per cent of the estate, or 10.5 per cent plus the heirlooms.

[48] The first ground can be disposed of briefly. The Judge did acknowledge Yvonne had received the $166,000, but that fact was discussed in the context of Yvonne's financial position generally (which is plainly a relevant factor). The Judge also confirmed that Yvonne was not required to justify her (large) share of the estate under the will. Her financial position was just one of many factors the Judge considered in reaching her decision.

[49] The second ground requires more careful considerations. A 40 per cent share (30 per cent uplift) is substantial. It is larger than any of the end shares in any of the cases the Judge referred to – and her Honour's review was quite extensive. However, this may be explained by the particular circumstances of this case (the estate is modest in value, the fact that Yvonne did not contribute to building the asset base in the estate, and Yvonne's own independent financial circumstances).

[50] The "plainly wrong" test requires something more than being able to say I would have a reached a different decision. This is the distinction between the *May v May* and *Austin, Nicholls* standards. The redistribution has to have been so out of step with the facts as to be unsupportable.

[51] The appellant's arguments do not get the case over that line. The award was a much higher proportion of the estate, but it can be easily defended as reasonable. In particular, the modest size of the estate, the number of claimants to whom a duty was properly found to be owed and Yvonne's own financial circumstances are relevant. So is the fact that Yvonne still received 60 per cent of the estate, a result not inconsistent with John's clear preference for supporting Yvonne over the children.

[52] I have considered whether these options of reallocating the heirlooms to the children would tip the balance in favour of overturning the Family Court award. If I were making the decision, that would be a factor that would weigh with me. The heirlooms are plainly of high sentimental value to the children. That might well have justified a slight reduction in my mind. But the test is not whether I would have assessed quantum differently. The test is whether this aspect of the decision was plainly wrong. And ultimately, by a narrow but clear margin, I do not think it was.

[53] The appeal must be dismissed accordingly. Costs are reserved and may be dealt with by brief memoranda if necessary.

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**Williams J**